

1 IN THE UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF ALABAMA

3 SOUTHERN DIVISION

4
5 IN RE BLUE CROSS BLUE SHIELD CASE NO. 2:13-cv-20000-RDP
6 ANTITRUST LITIGATION MDL 2406

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8 **TRANSCRIPT OF STATUS CONFERENCE**

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11 BEFORE THE HONORABLE R. DAVID PROCTOR, UNITED STATES
12 DISTRICT JUDGE, at Birmingham, Alabama, on Monday, February 13,
13 2023, commencing at 10:08 a.m.

14
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The proceedings were reported by a stenographic court
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1 (Proceedings commenced at 10:08 a.m.)

2 THE COURT: We are here for a status conference in In
3 Re Blue Cross Blue Shield Antitrust Litigation MDL 2406, our
4 Master File 13-cv-20000. Yes, I did say 13. This is pretty
5 much the ten-year anniversary; right?

6 MR. BOIES: It is, Your Honor.

7 THE COURT: Didn't it come, like, in January of '13?
8 I think the panel met in Boise late 2012 maybe?

9 SPEAKER FROM AUDIENCE: I think Dallas.

10 THE COURT: What's that?

11 SPEAKER FROM AUDIENCE: Dallas.

12 THE COURT: Was it in Dallas?

13 SPEAKER FROM AUDIENCE: Yeah.

14 THE COURT: Oh, Boise was BP Deepwater Horizon. In
15 Dallas. Okay. So Dallas, I can always blame Dallas for this.

16 All right. So I think the main order of business,
17 separate and apart from reports from the two sides on
18 Subscriber track cases, would be argument on the appeal bond
19 matter. Anything we need to take up before we begin that,
20 though?

21 MR. BOIES: Not from the Plaintiffs or Subscribers in
22 any event, Your Honor.

23 MR. WHATLEY: And there's nothing from the Providers
24 either.

25 MS. DEMASI: And nothing from the Blues, Your Honor.

1 THE COURT: All right. So we have Mr. Smith and Mr.
2 Smith, Smith versus Smith?

3 MR. SCOTT SMITH: Yes, Your Honor.

4 THE COURT: All right.

5 MR. SCOTT SMITH: Thank you, Your Honor. I'm sorry.
6 Can you hear me?

7 THE COURT: I can hear you. We're going to need to
8 pump your volume up just a little bit, either on your side or
9 on my side.

10 MR. SCOTT SMITH: Thank you. I'm in the middle of a
11 jury trial in Texas, so thank you for allowing me to appear
12 virtually. I wish I was there in person.

13 THE COURT: Where are you in Texas?

14 MR. SCOTT SMITH: I'm actually in Denton, Texas, which
15 is about 40 miles north of Dallas.

16 THE COURT: I know where Denton is.

17 MR. SCOTT SMITH: In the 362nd. We're in state court
18 in the middle of a jury trial right now, so --

19 THE COURT: Okay. Well, I appreciate them sparing
20 you. I take it you're observing, just noting all the ways you
21 can try to get the judge reversed, though.

22 MR. SCOTT SMITH: Embedded appellate counsel, yes,
23 Your Honor.

24 THE COURT: I know how that works.

25 Yes, sir?

1 MR. LOWREY: I don't mean to interrupt. I'm Frank
2 Lowrey, here for the Home Depot. We also may be heard
3 responding to this motion. But the seats look full here, so
4 I'll just hide back here.

5 THE COURT: Well, we have a seat at the end of that
6 table right there. I don't think the Blues will give you any
7 cooties. You can sit right there, too. Okay. I guess you
8 guys do have cooties.

9 All right. Mr. Smith, are you kicking us off?

10 MR. CYRIL SMITH: I am, Your Honor. And I guess I
11 should say, as to my adversary in Texas, no relation, to the
12 best of my knowledge.

13 THE COURT: You know, that happens when your last name
14 is Smith from time to time.

15 MR. CYRIL SMITH: From time to time. So good morning,
16 and may it please the Court, Cy Smith, on behalf of the
17 Subscriber class. And we do appreciate the opportunity to be
18 heard on this issue. It's a very important matter for the
19 class, over 100 million people and business entities.

20 And, Your Honor, I've a couple points to make, but my
21 biggest goal today is obviously to answer the Court's
22 questions after there's been substantial briefing on this to
23 make sure that the Court is --

24 THE COURT: You know me. I'll have some questions
25 along the way, but I'm going to at least let you get started.

1 MR. CYRIL SMITH: Okay. Good. Well, let me start
2 with the facts, because there's a suggestion by some of the
3 Objectors that this is somehow just a hypothetical, that the
4 risk in damages to the class are not real and substantial.
5 And two things about that. The first is that the delay is
6 real. The order was entered on August 9th, the final approval
7 order modified September 7th and, but for the Objectors'
8 appeals, would have become final in September or October of
9 last year. So we're now four or five months into the appeals
10 process. The briefing is not yet complete. And although the
11 Eleventh Circuit has agreed to expedite those appeals -- and
12 we're grateful for that -- there's no guarantee as to when
13 this --

14 THE COURT: What does that mean, "expedite" the
15 appeals?

16 MR. CYRIL SMITH: It was not clear from the order,
17 Your Honor, so we don't have an oral argument date. They
18 haven't said whether there will be oral argument or, if there
19 is, what it'll be. And certainly --

20 THE COURT: Briefing is complete, though?

21 MR. CYRIL SMITH: The briefing is not yet complete,
22 Your Honor. Should be --

23 THE COURT: When will the briefing be complete?

24 MR. CYRIL SMITH: Roughly 45 days, I'm told by
25 appellate counsel.

1 THE COURT: Subject to extensions being granted?

2 MR. CYRIL SMITH: Subject to extensions being granted,
3 and one or two has been requested, I think by the Bradley
4 Arant Objectors. So the briefing's not yet complete. We
5 don't know when a decision will issue. And I think the
6 Court's familiar with the fact that disappointed Objectors,
7 even after they lose, they've been known to file petitions for
8 rehearing and cert petitions. That's what happened in
9 *Equifax*. And so our projection of up to two years of delay
10 from these appeals we think is a reasonable one.

11 The second point I'd make is that the injury to the
12 class is real. Our motion was supported by detailed
13 decorations by credentialed experts. It described the impact
14 in terms of the administrative expenses, the lost investment
15 returns, the lost value of the injunctive relief. And, Your
16 Honor, we also have the Court's own assessment of the value of
17 that injunctive relief. At the time of final approval, the
18 Court said that as significant as the monetary amount of \$2.67
19 billion is, the truly exceptional aspect of this settlement is
20 the structural relief. And, of course, the Court can make
21 assessments like that; it's empowered to do that in resolving
22 all kinds of class controversies.

23 THE COURT: Are your arguments here really targeting
24 Rule 8?

25 MR. CYRIL SMITH: There are three independent routes

1 to the relief that we're seeking.

2 THE COURT: All right.

3 MR. CYRIL SMITH: And they -- and I'll be happy to
4 turn to them.

5 THE COURT: Rule 7 has to do with the risk of
6 nonpayment of appeal costs; right?

7 MR. CYRIL SMITH: Certainly of appeal costs, and the
8 question is, What does "cost" mean? And so the three routes
9 are Rule 8, which you just mentioned, they're the inherent
10 power of the Court, and Rule 7.

11 THE COURT: All right. What do you think is your best
12 route?

13 MR. CYRIL SMITH: Your Honor, I think it's a tie of
14 the sort we saw last night up until the very last seconds.
15 It's a tie between Rule 8 and inherent authority, with Rule 7
16 a little bit behind, maybe half and --

17 THE COURT: Rule 7, there's really not a great risk of
18 nonpayment of appeal costs here, is there? Not a record that
19 would support that in any way?

20 MR. CYRIL SMITH: I completely disagree with that. So
21 the issue here, all of these cases -- the Court has a lot of
22 discretion about whether to impose a bond and in what amount.
23 And in the case of -- in this case --

24 THE COURT: Well, each appellant has submitted itself
25 or is subject at least in part to the jurisdiction of the

1 Court; correct?

2 MR. CYRIL SMITH: It has, but that's really just the
3 start of the sentence.

4 THE COURT: Well, that means that if there -- and
5 usually, appeal costs, the appellate court allows the district
6 court to do the pick-and-shovel work on that; right?

7 MR. CYRIL SMITH: It does, but there's a big
8 difference between the ability to pay a judgment and the fact
9 of payment; right? That the personal jurisdiction that the
10 Objectors have submitted to just means that we can start the
11 proceeding in this Court. It doesn't mean that we can collect
12 on the judgment. That's the purpose of a bond. And that's
13 why the Court in *Equifax* said that the meaning of "insure" in
14 Rule 7 is to make certain -- to make certain -- so that you're
15 safe and sure. And I would just say, as a matter of personal
16 history -- yes?

17 THE COURT: Yes, but the size of most -- so we have
18 some individual Objectors, like Behenna, Cochran, Craker, but
19 the -- we have some large institutional Objectors here that I
20 just don't see there being a great threat to nonpayment. Tell
21 me why I'm wrong.

22 MR. CYRIL SMITH: I would just say that there's a
23 difference between having a judgment and collecting on it. I
24 think it's likely, when you're talking about tens of millions
25 of dollars, that certainly for Topographic and Employee

1 Services you're going to have to docket your judgment in
2 another jurisdiction and go chase them. And even for Home
3 Depot, Your Honor --

4 THE COURT: I'm talking about Rule 7 appeal costs at
5 this point.

6 MR. CYRIL SMITH: I'm sorry?

7 THE COURT: I'm talking about Rule 7 appeal costs.
8 But you're relying upon your expanded definition of costs?

9 MR. CYRIL SMITH: I am, Your Honor, I am. So that's
10 my --

11 THE COURT: Any case law that says costs aren't
12 out-of-pocket costs under a Rule 7?

13 MR. CYRIL SMITH: Absolutely. I mean, take a look at
14 -- in this circuit take a look at *Allapattah*; right? Take a
15 look at *In Re Checking Account Litigation*. And I think
16 there's -- actually, if you look at the decision, the district
17 court decision in *Equifax*, coming out of the Northern District
18 of Georgia, that --

19 THE COURT: Judge Thrash?

20 MR. CYRIL SMITH: That's correct, Your Honor. That
21 Court observed that Rule 7 costs include increased
22 administrative expenses and lost interest. I mean, that's in
23 his 2020 opinion that went up to the Eleventh Circuit.

24 So that's -- let me circle back now to the top and
25 I'll come back to Rule 7, if that would be helpful. So in

1 terms of inherent authority, you know, the Eleventh Circuit
2 has expressly recognized in *Pedraza v. United Guaranty* that
3 the Court has inherent authority to require a bond from an
4 Objector. And it's not just the Eleventh Circuit talking;
5 right? They cite *Chambers v. NASCO*. That's the Supreme Court
6 case from 1991. And we cite more modern case law at page nine
7 of our reply because that inherent authority goes back more
8 than 200 years, really almost to the time of the founding.
9 And that authority exists even though there might be rules or
10 even statutes that address the same sort of -- or related
11 matters.

12 *Chambers* held that the inherent power of the Court can
13 be invoked even if procedural rules exist which sanction the
14 same conduct. And once that inherent authority is recognized,
15 normal equitable rules will apply. And so the Court's duty is
16 to balance the massive harm to the class against the
17 inconvenience, frankly, to the Objectors of posting a bond,
18 and always bearing in mind, Your Honor, that the cost of the
19 bond is the premium; right? And we put in our reply -- I
20 don't think there's been any counterargument from the
21 Objectors on this -- that that premium can be as little as
22 .3 percent of the principal amount, or 1 percent, something
23 like that. And the authority that this Court has with respect
24 to this isn't limited, obviously, to situations where there's
25 bad faith or frivolous appeals, but as a matter of equity, the

1 Court certainly can consider the merits of the appeals that
2 are pending.

3 And I'd just like to mention a couple of things that
4 the Court said about certain of the objections which are now
5 on appeal. This is at pages 56 to 60 of the final approval
6 order. The Court pointed out that the Objectors had failed to
7 make a credible showing, overlooked crucial evidence, missed
8 the point and were simply wrong. And I would also say that
9 the Court should be very comfortable in assessing the merits
10 of the appeal.

11 The Eleventh Circuit said this in a case that we cite
12 in our papers, *Young v. New Process Steel*, in 2005. It said
13 that, quote, District courts have a great deal of experience
14 in weighing the merits of potential appeals, unquote. And the
15 Court went on to give the example of habeas appeals where the
16 Court has to make exactly that type of judgment. In other
17 words, would an effective appeal lie based on the facts that
18 are presented to the Court. And the Court, I think,
19 therefore, has that ability, has that power, has the right to
20 do so.

21 In the final analysis, with respect to inherent
22 authority, this power, this historical power of equity, gives
23 to the Courts the power to, as the Eleventh Circuit -- or
24 actually, this is the Fifth Circuit -- binding authority from
25 before the schism, to process litigation to a just --

1 THE COURT: I'm going to tell Judge Tjoflat that you
2 just called it a schism.

3 MR. CYRIL SMITH: I'm sorry. I'm coming from the
4 Fourth Circuit, Your Honor. -- to process litigation to --

5 THE COURT: Judge Tjoflat would say it was a surrender
6 of appellate jurisdiction.

7 MR. CYRIL SMITH: Okay. I'm going to engrave that on
8 my forehead and make sure I refer to it that way.

9 So a case coming from before the lawful transfer of
10 appellate authority, *ITT v. Barton*, 569 F. 2nd 1359, said it's
11 the power to process the litigation to a just and equitable
12 conclusion. And to do that here, plainly, counsel is in favor
13 of the bond. So that's path number one.

14 Path number two is Rule 8, and the result is much the
15 same. Rule 8(a), as the Court knows, directs the parties to
16 move first in the district court for, quote, approval of a
17 bond or other security provided to obtain a stay of judgment.
18 And Objector Cochran concedes, at page eight of his brief --
19 he says, Rule 8 can secure against an appeal's postponement of
20 benefits, unquote.

21 The best case to illustrate this principle, Your
22 Honor, is in *In Re Checking Account Litigation* [sic], where
23 Judge King, who I understand has seen a few things in his time
24 on the bench, approved a \$410 million class settlement, but
25 there were nine groups of Objectors who appealed. Judge King

1 ordered the bond based on what he called the high likelihood
2 the order will be affirmed and that such appeal bonds will
3 provide the protections typically afforded appellees during
4 the pendency of the appeal, particularly in the context of
5 class actions.

6 Now, like the Objectors here, the Objectors in Judge
7 King's case objected and insisted they cannot be required to
8 post a supersedeas bond under FRAP 8 because they have not
9 sought a stay. Judge King responded and he said, Because the
10 filing of this appeal prevents distribution of the settlement
11 proceeds as ordered by the Court's final judgment, it is an
12 actual stay of judgment; bond is appropriate. There's another
13 in-circuit case on this --

14 THE COURT: Is he essentially saying it's a de facto
15 stay?

16 MR. CYRIL SMITH: He is. He's saying they have, in
17 fact, obtained a stay, and therefore, met the requirements or
18 brought Rule 8 into play.

19 And there's another in-circuit case on this, Your
20 Honor, under Rule 8. You can take a look at Aboltin,
21 A-B-O-L-T-I-N, versus Jeunesse. That's a 2019 decision from
22 the Middle District of Florida where the Court held to the
23 same effect. Either of those, inherent authority or Rule 8,
24 gets us to a bond. And with respect to Rule 7, we've talked
25 about that.

1 I would say one more thing about Rule 7, Your Honor.
2 You just focused on the risk of nonpayment. I would say that
3 the four-part test has not been abolished in this circuit, the
4 four-part test for imposing a bond, where you look also at
5 whether or not the bond can be posted, you look at the merits
6 of the appeal, things of that nature. If you look at the
7 language in *Equifax* on which the Objectors relied, that
8 language is plainly dictum on this point. And so we would
9 submit that given the lack of merits of these appeals, given
10 the fact that Home Depot proclaims that it can post a bond and
11 that the others have not objected in terms of their ability,
12 not provided any proof that they can't, the four-part test
13 governs and we meet, really, all of the elements of that
14 four-part test.

15 THE COURT: What -- give me your best argument as to
16 what -- let's say the bond -- let's say we're at the end of
17 the day two years after the fact, two years after the appeal
18 was filed, and lightning strikes and I get affirmed; okay?
19 And now we're having to determine what the costs of appeal
20 are. Obviously, it's easy to determine what I kind of view as
21 the Rule 7 costs of what was the cost of copying, hard
22 out-of-pocket costs. How have courts gone about determining
23 these soft costs of delay?

24 MR. CYRIL SMITH: Well, first of all --

25 THE COURT: So what did Judge -- let's start with what

1 Judge King said. How would you characterize that?

2 MR. CYRIL SMITH: Okay. So in terms of how soft, how
3 hard those are, if you start with administrative expenses,
4 there's no way, respectfully, that I think that those can be
5 called soft costs. They are actual invoices, you know, that
6 were incurred and paid during the time of the delay, because
7 you can't consummate the settlement until you've resolved all
8 the issues that have been raised by the Objectors. And so
9 that's a monthly element in terms of keeping the phone lines
10 open, responding to calls. You've got a massive cyber
11 insurance premium. And so the record evidence -- and there's
12 nothing to the contrary -- is that the two-year cost of that
13 is \$13.9 million. That's hard.

14 The second point, with respect to the delay in the
15 injunctive relief and the lost investment opportunities,
16 right, the lost interest, if you will, the investment losses,
17 those are just like the sorts of costs that you have to
18 assess, for example, if you're executing on another type of
19 bond, like a preliminary injunction bond. It's subject to
20 proof; right? We'd have to show that we had a reasonable
21 estimate of the damages. The Defendants -- excuse me -- the
22 Objectors could argue against that, but when you execute on a
23 bond after a TRO or a preliminary injunction, exactly these
24 sorts of issues come up. And so this is really not a question
25 of whether there should be a bond. Plainly there should be.

1 This is a question of whether they have some argument to make
2 to prevent execution on the bond later.

3 And in terms of setting that bond, I just want to
4 suggest that the Court needs to bear in mind, first of all,
5 it's got a lot of discretion on this. But second, if there's
6 any uncertainty about this, the Court should err in terms of
7 making sure that, first of all, there is a bond and, second,
8 that it's very substantial, because from our perspective and,
9 really, from anyone's perspective, the bond is an insurance
10 policy to make sure that the entire class, all
11 hundred-million-plus of the Subscribers, is made whole for
12 these damages. And if you're looking at an insurance policy,
13 you want to make absolutely sure that it covers every last
14 dollar of potential loss. If you were buying, you know, a
15 different type of insurance policy, like a homeowners policy,
16 you'd want to make sure that it covered the possibility of
17 complete loss of the house if there was a tornado or a massive
18 tree fell on it. You wouldn't want to say, Well, let me put
19 it, you know, partways there or let me gamble that there will
20 not be a loss. You'd want to make sure that the whole thing
21 gets covered.

22 THE COURT: Well, doesn't the settlement agreement
23 itself, though, contemplate that there would be delay in the
24 effective date based upon what was anticipated to be
25 objections and appeals?

1 MR. CYRIL SMITH: Certainly the settlement agreement
2 had provisions for when it becomes effective and it had
3 provisions for what the investments can be, but there's
4 nothing in the settlement agreement, Your Honor, that gives
5 rights to the Objectors that immunizes the Objectors from the
6 harm that they cause. You know, if I could borrow a term from
7 tort law, the Objectors have to take their victim as they find
8 them; right? We've got the hundred million members of the
9 class who are suffering this injury. Nothing in this
10 agreement, right, which is 100-plus pages long -- nothing in
11 this agreement gives rights to the Objectors. Nothing in it
12 says that they're not at risk when they cause delay and they
13 cause harm to the class.

14 So if you look at other types of cases, Your Honor,
15 one that the Objectors cite is *Vaughn v. American Honda* from
16 the Fifth Circuit. That was a case where the Court found that
17 the agreement didn't give the right -- any rights -- to the
18 Plaintiffs in terms of gain in value from the funds invested
19 in the settlement. Here, the Subscriber class is supposed to
20 receive the full benefit of that, and we would have received
21 the full benefit but for the appeals.

22 So for all of those reasons, you know, you've got to
23 give -- you've got to make sure that the Objectors take
24 responsibility for the damages that they potentially cause,
25 and to err on the side -- because the Court is in effect a

1 fiduciary for the class -- to err on the side of
2 overinclusiveness and protection for the class. And if that's
3 the default, which we think it should be, we think the way
4 forward is relatively clear.

5 I'd be happy to answer any other questions for you.

6 THE COURT: I may have questions for you when you get
7 up once again.

8 MR. CYRIL SMITH: Okay. Thank you, Your Honor.

9 THE COURT: All right. Anyone else speaking on behalf
10 of the bond? I didn't think so. I thought you would be
11 covering that for everyone.

12 MR. CYRIL SMITH: I hope so.

13 THE COURT: All right. Who -- what order are we going
14 to take this up from those opposing bond?

15 MR. LOWREY: Mr. Smith and I spoke about this earlier,
16 and we thought since he's in Texas, I would start and he would
17 follow up.

18 THE COURT: All right. Fair enough.

19 MR. LOWREY: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. LOWREY: I appreciate you having us in to talk
22 about this. I'll start the same way Mr. Smith did, which is
23 to ask whether the Court has a particular question for me, or
24 do you want me to start with the points that I think are
25 important?

1 THE COURT: You relied in part, as I recall, on the
2 *Muransky* decision. I'm sorry. Your opponent relied in part
3 on the *Muransky* decision, saying that a supersedeas bond was
4 not appropriate on the appeal there. Do you have any idea of
5 exactly what the costs on appeal were after *Muransky* got
6 reversed?

7 MR. LOWREY: I have some more detailed notes at
8 counsel table, if I could grab them.

9 THE COURT: Sure.

10 MR. LOWREY: Let me see if they illuminate that issue,
11 Your Honor. I apologize.

12 THE COURT: That was a FACTA settlement, as I recall;
13 correct? Or FACTA case?

14 MR. LOWREY: My memory is, I think, not as good as
15 yours, but I've got a table of notes that may --

16 THE COURT: It was a FACTA case, a class action
17 settlement that got reversed on appeal at the Eleventh
18 Circuit.

19 MR. LOWREY: And the question from the Court was what
20 were the costs after the reversal?

21 THE COURT: Yeah. I'm just curious, you know, what --
22 I'm just curious.

23 MR. LOWREY: Yeah, I have not followed that down, so
24 am not able to answer that question, Your Honor.

25 THE COURT: That's fine.

1 MR. LOWREY: And we could certainly do that later for
2 you and report back.

3 THE COURT: Okay.

4 MR. LOWREY: I thought maybe we would talk first about
5 Rule 7 and the necessity of payment. I think the best reading
6 of Eleventh Circuit law, the Equifax case, is that the Court
7 can require a bond only if it finds it necessary to ensure
8 that a losing appellant can pay the costs on appeal, whatever
9 costs are assessed. And the one thing that the parties seem
10 to be in agreement upon in this motion is that the Home Depot
11 could pay those costs.

12 THE COURT: Would those costs be joint and several if
13 they were assessed?

14 MR. LOWREY: I don't know, Your Honor. I haven't
15 looked at that issue, and I would think that would be
16 something that we would take up with you were we to lose the
17 appeal. For example, the Objectors raise different --

18 THE COURT: That does affect ability to pay; correct?
19 Because we've got some individual Objectors who may not be
20 willing to pay if, in fact, Mr. Cy Smith is correct on the
21 amount the costs would equal.

22 MR. LOWREY: So I certainly couldn't speak for the
23 ability of the other Objectors to pay and maybe should
24 clarify, I'm speaking --

25 THE COURT: I'm just taking a wild guess that if he's

1 right and 113 million is the cost that individual Objectors
2 may not be able to bear that.

3 MR. LOWREY: I think there's some risk of that, Your
4 Honor, and, of course, I speak only for the Home Depot and
5 whether there should be a bond levied against the Home Depot
6 or required of the Home Depot. I'll have to let the
7 individual Objectors speak for themselves.

8 THE COURT: But I was asking about joint and several
9 because if, in fact, costs are due and they are, in fact, high
10 and your client has deeper pockets than the others, that seems
11 to me to be something you'd need to address.

12 MR. LOWREY: Well, it is certainly something that we
13 would address before you entered a cost award. It would not
14 be a reason why you should require the Home Depot to post a
15 bond, because what --

16 THE COURT: No, no. It would be a reason I should not
17 require the Home Depot to post a bond if, in fact, one, this
18 is joint and several liability on a bond; and, two, I make the
19 determination that you're able to pay and there's not a risk
20 of nonpayment; three, you'd agree with me that that could come
21 back to me and I have jurisdiction based upon Home Depot's
22 partial participation in this settlement. Correct?

23 MR. LOWREY: I think I understand the points you've
24 made. Before I agree to something, let me recite them back to
25 you.

1 THE COURT: Take them one at a time. That may be your
2 safer course.

3 MR. LOWREY: And so the first point, Your Honor --
4 refresh me on -- your first point was --

5 THE COURT: Whether this is joint and several. And
6 maybe we'll get Mr. Scott Smith's view on that real quick.
7 Does he have one?

8 MR. SCOTT SMITH: Your Honor, the costs under Rule 7
9 are marginal, 15 cents for in-house copies. The Eleventh
10 Circuit only requires less than ten copies of the briefs, and
11 we have carried the water on the appendix. There may be some
12 marginal things outside of our appendix, but we filed a
13 multivolume appendix covering all of those. But I -- so if
14 we're talking about the costs awardable under Rule 7, I think
15 it is joint and several, but I've never filled out a cost bond
16 -- I mean a cost petition -- in my career in 25 years because
17 it costs more for me to fill it out than the money that's
18 recoverable.

19 THE COURT: Right.

20 MR. SCOTT SMITH: So I don't know if I answered your
21 question, but the Rule 7 costs are just minimal.

22 THE COURT: Well, what about the Rule 8 costs?

23 MR. SCOTT SMITH: Well, Your Honor, I don't know that
24 there are any Rule 8 costs here because this isn't a judgment
25 that has to be superseded insofar as there's injunctive relief

1 in play. Paragraph, I believe, 19 of the settlement agreement
2 postpones implementation of that pending the outcome of the
3 appeal and any discretionary review in the Supreme Court. And
4 so I don't know that there's any -- we haven't asked for a
5 stay and the parties have negotiated that delay on their own.
6 So they've taken that on and they've put the money in escrow
7 to protect against it. So there's no need for an insurance
8 policy. And thankfully, for the recipients of those funds,
9 the interest rates have gone up in the interim. So, I mean,
10 this Court's already recognized in day two, at the end of that
11 transcript, that we're talking about real money when you've
12 got interest on \$2.6 million.

13 THE COURT: All right. But what if -- and again, this
14 is a "what if" -- what if the Court were to accept for
15 purposes of argument only that it may, at the end of the day,
16 be an issue of whether this operated as a de facto stay of
17 judgment on an order of the district court pending appeal and
18 I were to determine that some bond would be appropriate to
19 provide for that? The question becomes, would responsibility
20 for the bond and whether it's \$2,000, the usual, maybe high
21 end of a Rule 7 bond or some much higher figure such that the
22 appellees are arguing for here, it seems to me it doesn't
23 matter what amount we're talking about. The question is, is
24 responsibility for the bond joint and several among the
25 appellants? So I'm taking the issue off the bond -- I'm

1 taking the issue off the board of the amount of the bond. I'm
2 just saying is it joint and several?

3 MR. LOWREY: I have some thoughts --

4 MR. SCOTT SMITH: I would think so, Your Honor. I
5 wouldn't think that you would have the parties, in a Rule 8
6 scenario, post separate bonds. I think there would be one
7 bond and you would hear arguments and we would litigate over
8 the amount of that bond and --

9 THE COURT: I'm asking a slightly different question.
10 I'm obviously not doing it well because I've got two really
11 smart lawyers who are not realizing my question. So let me
12 try it again. The question is, there's not a bond and we're
13 at the end of the day and there's a determination that there's
14 a very large cost of this appeal. Is that responsibility for
15 the cost of an appeal at the end of the day joint and several?

16 MR. LOWREY: And so let me take a swing at that one,
17 if you don't -- if Scott doesn't mind.

18 THE COURT: All right.

19 MR. LOWREY: I think it depends -- I know that it
20 depends upon what the composition of that cost award is, and
21 here's why. So, for example -- and I know you're not talking
22 specific numbers yet, but 54 million of the 113 million that
23 the Subscribers want covered with this bond is the lost time
24 value of the B3 funds as a -- I'm sure the Court recalls from
25 the papers. And so, for example, we didn't appeal the B3

1 settlement at all. The only reason why an appeal of the B2
2 settlement stays distribution of those funds is purely a term
3 of contract. We would never have been --

4 THE COURT: It's the way the parties designed it?

5 MR. LOWREY: Exactly. And you approved it. It is
6 their request, not mine, that the distribution of those funds
7 were stayed, and so any liability for that wouldn't fall on me
8 as the Home Depot.

9 Let me add one more thought before I leave that point.
10 That 54 million wouldn't be assessable against anyone. It is
11 the spread between the one-year T-bill rate that the
12 settlement agreement allows them to invest in and more
13 aggressive, like, corporate bond investments. What that is is
14 an attempt to recover postjudgment interest in excess of the
15 statutory allowance. So 1961 -- when you enter a judgment,
16 under 1961, the interest accrues at the one-year T-bill rate
17 for the week before the judgment was entered. So they're
18 already getting, through the settlement investment, the most
19 postjudgment interest they could possibly get. There is no
20 authority for someone to take --

21 THE COURT: Okay. Well, I feel like we're straying
22 from the scope of my question.

23 MR. LOWREY: Let me --

24 THE COURT: Here's why I'm asking this.

25 MR. LOWREY: Sure.

1 THE COURT: I could easily dispose of this bond issue
2 if I understand the following facts to be true: One, it
3 doesn't matter what the cost -- what the appeal costs are. We
4 can worry about that later, or not, as the case happens, more
5 particularly, as the appeal happens. Two, regardless of what
6 the cost is, your client and others have the ability to bear
7 that cost. And three, they're subject to my jurisdiction and
8 I could make sure they bear that cost. They have the ability
9 and we have the opportunity. If all those are true, it seems
10 to me there's really no threat of appeal costs not being
11 honored ultimately and, therefore, there's no need for a bond.
12 But if you're hesitant to concede that your client and maybe
13 other corporate clients are not jointly and severally liable
14 for this, then the next question in my mind becomes, well,
15 then, what should be the apportionment if there should be
16 separate appeal bonds as I think you just said a moment ago or
17 maybe Scott said a moment ago. I'm going to say Scott, not a
18 lack of formality, but just to make sure we distinguish from
19 Cy; okay?

20 All right. So if that's the case, then again, I'm not
21 too concerned about an appeal bond because, again, if there's
22 a readily discernible way to determine what the responsibility
23 is -- at this point we think that the corporate clients are
24 going to bear the substantial weight of the load on appeal
25 costs, whatever those may be later -- then I'm not real

1 concerned about a bond then; okay? And then the third thing
2 is, it makes sense under those two scenarios to just not worry
3 about this now because, you know, we don't worry about appeal
4 bonds unless we get an affirmance --

5 MR. LOWREY: That's right, Your Honor.

6 THE COURT: -- or appeal costs unless we get an
7 affirmance, because the cost may be transferred to the losing
8 side.

9 MR. LOWREY: The only part of that that I can't say is
10 I cannot stand here and agree that the Home Depot would be
11 jointly and severally liable for the entire amount. This is
12 what I can say: Whatever costs you assessed that you found
13 right to assess against the Home Depot, there is no risk of
14 nonpayment. And so I can't -- I can't I guess, dispense with
15 your necessity to consider whether a bond might be required as
16 to others.

17 THE COURT: Yeah, you're in a tough spot here because
18 you're a worthy advocate and an officer of the Court at the
19 same time. So I'm asking you in both capacities, at the end
20 of the day, if -- let's say, it's not joint and several, at
21 the end of the day we're apportioning costs, whether it's
22 \$2,000 or \$113 million or some number in between those two
23 polar opposite figures, what would be the corporate
24 responsibility versus the individual responsibility for these
25 things?

1 MR. LOWREY: It would depend on -- so the first thing
2 I said is always going to be true. Whatever you decide the
3 Home Depot's responsibility is, the Home Depot has those
4 resources.

5 THE COURT: Yeah. But I'm asking you what my -- legal
6 test I'm supposed to apply.

7 MR. LOWREY: So again, it would come up to what costs
8 are you assessing? And I've just explained to you my views of
9 why, if the costs you are assessing is this lost-time value --
10 I've already explained my views on why that wouldn't be
11 appropriate against the Home Depot.

12 THE COURT: But if it were --

13 MR. LOWREY: But if it was awarded against us, then we
14 would be good for it --

15 THE COURT: Yes.

16 MR. LOWREY: -- that's right. And I snuck in there my
17 argument about how this is illegitimate prejudgment interest,
18 which you almost let me finish.

19 THE COURT: I let you finish the point. I knew what
20 your argument was.

21 MR. LOWREY: Good enough. Suppose that -- suppose,
22 though, that the composition of the bond -- well, suppose it
23 was administrative costs, you know, something like -- that
24 might be a better argument for joint and several liability.
25 We'd have to cross that bridge when we came to it, but again,

1 whatever liability you found was appropriately the share of
2 the Home Depot --

3 THE COURT: Well, we're not crossing the bridge, but
4 what Cy Smith is arguing is that we need to plan for the
5 bridge and we need to have an insurance policy for the bridge.

6 MR. LOWREY: Sure. And what I don't understand about
7 that is they already have one. Do you recall how -- perhaps
8 you recall how the settlement works on this point, which is if
9 they exceed the hundred-million-dollar cap and they got --

10 THE COURT: There would be replenishment.

11 MR. LOWREY: They've got replenishment from the Blues,
12 not from the class, from the Blues. Under no circumstances,
13 even if we were to increase the administrative costs, do we
14 increase -- do we somehow diminish the class recovery. So
15 that item can't be assessed against anyone.

16 And if the Court will bear my indulgence, the third
17 and final element of their 113 million is the lost time value
18 of injunctive relief. And this one has me scratching my head,
19 too, because paragraph 19 of the settlement said that the
20 Blues were supposed to start taking necessary steps at
21 preliminary approval to implement that relief, and then -- and
22 the Subscribers left this out of their reply brief -- then
23 that they shall implement that injunctive relief as soon as
24 practicable. So if the Blues are doing --

25 THE COURT: Is that all the injunctive relief or

1 certain specific --

2 MR. LOWREY: It's all the major paragraphs of it. If
3 memory serves, that paragraph 19 exempts paragraph 16 of the
4 injunctive relief, but that's like a brand protection measure.
5 It's all of the stuff that the Subscribers tout as enhancing
6 competition. So if the Blues are moving right now to
7 implement that relief as soon as practicable, then the appeal
8 isn't changing anything. And if they aren't and that's
9 costing the class anywhere in the neighborhood of 45 million,
10 then I would think the Subscribers would be bringing that
11 issue to your attention and moving the Blues along. But if
12 they are doing what the settlement agreement says --

13 THE COURT: So as long as your client continues
14 selling wood, washers and wing nuts, we're okay?

15 MR. LOWREY: And there is no prospect we will cease
16 selling any of those things, Your Honor, and the many other
17 fine products you can find in our aisles. So --

18 THE COURT: And often do with my home needs.

19 MR. LOWREY: I am glad to hear that, Your Honor.

20 So, I have backed into my arguments about why none of
21 the 113 million could be laid on us under any circumstances.
22 I hope that I've answered your questions on necessity of
23 payment. I suppose I have a few more points that I want to
24 make. One of them is about the Exxon -- the Equifax case.
25 Mr. Smith says that the four-part test is still -- hasn't been

1 abandoned in this circuit and is still good law. And I agree
2 with you that -- I agree with him that *Equifax* ultimately
3 upholds Judge Thrash's bond on the one ground that the Court
4 recognized as legitimate, which was risk of nonpayment. But
5 about that four-factor test, what the Eleventh Circuit said
6 is, while most of these factors do not appear to be relevant
7 based upon our reading of Rule 7, the last factor, risk of
8 nonpayment, certainly is. And so they certainly don't have a
9 case, a binding Eleventh Circuit case, saying that you can
10 award a bond for any reason other than necessity of payment.
11 And even if what I had is dicta, my dicta is Eleventh Circuit
12 2021 dicta. Theirs is largely unpublished district court
13 out-of-circuit authority --

14 THE COURT: My dicta is better than their dicta.

15 MR. LOWREY: My dicta is better than their dicta. And
16 I think we're going to cut this one short right now.

17 THE COURT: Barry Ragsdale's speech to the Alabama
18 Supreme Court once upon a time.

19 MR. LOWREY: But, I mean, if you -- you know, I
20 don't expect you to read my notes, but they spent from this
21 part to this part (indicating), like virtually an entire
22 published page, which is pages and pages of the double space
23 the way they format these things, talking about this
24 necessity-of-payment requirement. I don't think they meant
25 district courts to ignore it. So I wanted to make that point.

1 I want to make a point about *Pedraza*. *Pedraza* is the
2 case where the Eleventh Circuit reversed the inclusion of
3 appellate attorneys' fees and a bond, and it reversed the
4 inclusion of those fees notwithstanding inherent power
5 arguments and rule-based arguments. And what the Court said
6 is, Look, appeal costs, you don't just make it up as you go
7 along; there has to be some actual authority in a rule or in a
8 statute or in well-established court power that makes those
9 costs the costs on appeal. And there's not anything in the
10 200 years of jurisprudence that lets you shift the costs
11 they're seeking to shift into an appeal bond. It's not --
12 it's not carte blanche just to make up items.

13 What else shall we talk about? Anything?

14 THE COURT: Let's find out what Scott Smith wants to
15 talk about.

16 MR. LOWREY: Fair enough, Your Honor. I'm going to
17 take my seat, then, while he --

18 THE COURT: You may.

19 MR. LOWREY: All right.

20 MR. SCOTT SMITH: Your Honor, we'd ask that you deny
21 this appeal bond. It's really not necessary. As far as my
22 appeal is concerned, it doesn't hold up to settlement by the
23 terms of the settlement itself. Page 29 of the settlement,
24 which is document 2610-2, says that an appeal of allocation
25 has no effect on the timing of the effective date. And so my

1 appeal is not holding anything up.

2 This is not a frivolous appeal. The Court has already
3 ruled on that in day three, on pages 53 and 54. The Court
4 recognized that these were all legitimate objections stated by
5 counsel on behalf of clients. That's page 54 of document
6 2866, day three.

7 I think we've set out in our briefing how
8 unprecedented a bond of this magnitude would be. I don't
9 think the Eleventh Circuit has ever approved a five-figure,
10 much less a nine-figure, appeal bond. Rule 7, as I've already
11 mentioned, covers very marginal expenses, and that's all that
12 would be in play here.

13 I think Frank did a good job of explaining about
14 paragraph 19 controlling the timing of the injunctive relief.
15 We haven't sought a stay. Rule 8 just doesn't apply. And
16 then lastly, I'd like to say that imposing a bond like this on
17 Objectors would be bad policy and make bad precedent. It
18 would be cost prohibitive for Objectors. It would discourage
19 meritorious objections. The Equifax case and the Pedraza case
20 both address the importance of Objectors to this process. And
21 so we would urge the Court to please deny this cost bond.

22 THE COURT: All right. Anyone else have any interest
23 opposing the bond here? I've heard from counsel. I didn't
24 know if there was any other Objectors that wanted to be heard
25 on that.

1 (No audible response.)

2 THE COURT: Okay. I think we're to Cy Smith's reply
3 arguments, if any.

4 MR. CYRIL SMITH: Thank you, Your Honor.

5 THE COURT: Do you feel a little bit better about the
6 fact that whatever I would determine would be a feel cost,
7 sounds like you're going to largely be able to collect that
8 if, in fact, you're entitled to it?

9 MR. CYRIL SMITH: So my first preference on behalf of
10 the class is to not have any uncertainty whatsoever. And to
11 quote from the Eleventh Circuit in *Pedraza* at page 1283 -- I'm
12 sorry, not *Pedraza* -- *Equifax* -- says that the word "insure"
13 means to make sure, certain, safe. There shouldn't be any
14 muss and there shouldn't be any fuss about collecting those
15 costs at the end of the day. And it's not good enough --

16 THE COURT: What do you say about their arguments
17 about the limitations on appeal bonds that the Eleventh
18 Circuit has upheld or determined being, you know, four figures
19 usually, five figures on a way-high side, never nine figures
20 like you're arguing for?

21 MR. CYRIL SMITH: Your Honor, the case just hasn't
22 gotten there. There's plenty of Courts of Appeal. So there's
23 the Sixth Circuit in *In Re Cardizem*, there's the Third Circuit
24 in *In Re Nutella* that have upheld appeal bonds of exactly the
25 type that we're talking about. This is not a bleeding edge

1 type of issue at all. So our first preference is to have a
2 bond so there's no question --

3 THE COURT: Is there anything in the law of the
4 Eleventh Circuit that would indicate they'd go there, though?
5 I understand other circuits have, but the Eleventh Circuit
6 says that you can't have class service awards. We have our
7 own brand of class-action jurisprudence. I'm just curious --

8 MR. CYRIL SMITH: Remember -- fair question, but
9 remember that *Equifax*, *Pedraza*, and *Scott v. New Source* -- the
10 *New Source Steel*, those are all Rule 7 cases; okay?

11 THE COURT: Right.

12 MR. CYRIL SMITH: Rule 8 and the inherent authority
13 are recognized in this district and Rule -- and inherent
14 authority is recognized in *Pedraza*. So I think the answer is
15 yes on those, those are absolutely independent. But the
16 second thing I want to say is I want to respond to the Court's
17 question in a way that, like my brethren did not -- yes?

18 THE COURT: Go ahead.

19 MR. CYRIL SMITH: Well, my first preference on behalf
20 of the class is let's have a bond, let's be certain and sure
21 and safe. But our second preference is, if there is an
22 agreement to be jointly and severally liable for all costs at
23 the conclusion of this, that is a second-best alternative but,
24 you know, it's clearly better than the status quo. So I don't
25 hear an agreement to that from either Home Depot or the

1 Bradley Arant Objectors, but that would be a second-best
2 alternative and, as I said, an improvement on things.

3 The third point I'd like to talk about is this idea
4 from both Home Depot and Bradley Arant that somehow the
5 settlement's being held up but it's not our fault, both of
6 them say. And first, with respect to Bradley Arant, he says,
7 Well, all we're doing is appealing the allocation and that's
8 not something that holds things up. But the problem, Your
9 Honor, is that's a great, sort of, technical argument, but in
10 the real world, JND can't divide up the money and pay it out,
11 right, until the allocation has been fully and finally
12 decided. So as a practical matter, they are suspending the
13 operation of the judgment, the one that you issued final
14 approval for, right, regardless of whether it is technically
15 the type of appeal that would do that.

16 A similar argument is made by Home Depot. They say,
17 Well, look at this, the -- everybody's supposed to be working
18 on implementing this relief, you know, you've got to implement
19 it as soon as practicable. But I don't think that Mr. Lowrey
20 quoted the entire language that's in there. If you look at
21 paragraph 19 of the settlement agreement, it says that the
22 settling Defendants shall begin taking steps necessary to
23 implement all the injunctive relief upon entry of preliminary
24 approval, and the settling Defendants shall implement as soon
25 as practicable but, in no event, no less than 60 days after

1 the effective date for most of the pieces of injunctive
2 relief, and the later of three months after the effective date
3 or April 1st, 2022, for paragraph 15, and that those deadlines
4 can only be extended by unanimous vote.

5 THE COURT: What do you make of their argument that
6 any extra costs for administration would be replenished, paid
7 for by the current fund, and replenished by the Blues, if it
8 exceeds the current fund?

9 MR. CYRIL SMITH: Well, I would go back to *Equifax* and
10 I would say that the point of the bond is to make sure and
11 certain and safe. We have a right to go to the Blues to
12 replenish. We have undisputed testimony from JND, a
13 declaration submitted with the motion, that says we're going
14 to go over that hundred million dollars. But we shouldn't be
15 at risk. The class should not be at risk. And the potential
16 for being at risk --

17 THE COURT: How are you at risk if the Blues are
18 required to replenish that fund?

19 MR. CYRIL SMITH: I think that at the end of the day
20 we win that argument but it's not required. We can request
21 it, and if there's a disagreement about it, the Court has to
22 decide it. And so that's my point. We're at risk for it.
23 It's a real --

24 THE COURT: But you have a process to replenish that
25 fund is what I'm saying.

1 MR. CYRIL SMITH: We have a process for asking for
2 replenishment for the fund, and I think that we should get
3 that.

4 THE COURT: You have a process for replenishing the
5 fund.

6 MR. CYRIL SMITH: That -- fair. I'm not trying to --

7 THE COURT: The settlement is not what our agreements
8 are about asking. It's -- the settlement is, here are the
9 agreements we've reached about how the fund will be
10 replenished.

11 MR. CYRIL SMITH: Again, it would depend on the
12 language and it would depend on the position the Blues took.
13 I think that we should get it replenished, but I go back, as I
14 said, to the language of *Equifax*.

15 So a couple of other points, if I might. So the first
16 is, if you're looking at Rule 8 and inherent authority, then
17 you have to go beyond the test under Rule 7; right? It's not
18 only the risk of nonpayment. Even if they're right about what
19 *Equifax* held, I think if you look at the language, it says
20 these other considerations may not be relevant, which to me is
21 the warning sign of dictum to come. But even if they're right
22 about that, under inherent authority in Rule 8, you do have to
23 look at the merits of things. You do have to try and make the
24 best decision you can to protect the class as a matter of
25 exercising the Court's inherent authority.

1 With respect to the argument that the money is taken
2 care of because we've already accounted for the risk of delay
3 in the settlement agreement, I would respectfully say that
4 that argument is circular, because it's really a question of,
5 you know, heads we win, tails you lose. From the Objectors'
6 perspective, they say, Well, you've already done something
7 about it, you've already done the best you could, and if we
8 cause more damages than that, more injury than that, that's
9 your problem. I don't think that's the right way to run this
10 particular railroad.

11 The next thing that I would say is that if you look at
12 the question of -- at the question of inherent authority and
13 Rule 8, a lot of these Rule 7 arguments kind of fall away to
14 the wayside, and the question under inherent authority and,
15 really, essentially the same under Rule 8 is to say what's the
16 best thing that the Court can do acting as a fiduciary to
17 protect the class and not to have to wonder, right -- as class
18 counsel or for the Court, to have to wonder at night what's
19 going to happen in a year and a half or two years from now.
20 And the best way to fulfill that mission is to require a bond
21 or, second-best alternative, to require joint and several
22 liability of all of the Objectors to pay this. Anything short
23 of that leaves open a lot of possibilities. Some of them are
24 good, some of them are bad. And the point under --

25 THE COURT: So what would you think if I asked both

1 sides to brief "joint and several" for me before I make a
2 decision?

3 MR. CYRIL SMITH: Again, my first preference is to
4 order a bond. If the Court wants to proceed in that
5 fashion --

6 THE COURT: Let's say you're not getting that today.

7 MR. CYRIL SMITH: Right, I understand that, and I've
8 told you what our position is, that joint and several
9 liability is a second-best alternative but it's better than --

10 THE COURT: My question is not where it falls in the
11 pecking order. It's is it a viable option for the Court to
12 require? Because it seems to me, look, at this point we are
13 doing some estimating work -- you're doing some estimating
14 work. We don't know -- if we had a decision come down
15 tomorrow and there was no petition to rehear, no petition on
16 bond, no cert petition, I -- you might make some arguments
17 about appeal costs at that point. But I think we're in a
18 completely different category than if this is three or four
19 years down the road; right?

20 MR. CYRIL SMITH: Those are two totally different
21 situations. I agree with that.

22 THE COURT: So we're dealing a little bit with the
23 unknown at this point, but one of the things we can start
24 working on is what is the known, and is the known such that,
25 regardless of what the unknown is, is it joint and several and

1 does it have to be apportioned? And probably -- I don't think
2 the parties -- for legitimate reasons, I don't think the
3 parties really focused on that. I might be interested in
4 having the parties focus on that over the next couple weeks.

5 MR. CYRIL SMITH: That's fair. I will remind the
6 Court that we actually did talk a little bit about that at the
7 end of our opening brief -- a little bit, a little bit -- and
8 we pointed to situations where the courts have done that. And
9 I would say the Court has a fair amount of discretion about
10 that; right?

11 THE COURT: That's what I'd like to hear from both
12 sides.

13 MR. CYRIL SMITH: Okay.

14 THE COURT: I think it's going to be easier for you to
15 write that brief than for them, if I might say that?

16 MR. SCOTT SMITH: Well, Your Honor -- this is Scott
17 Smith -- all I would say is we can't be held jointly and
18 severally liable for delay costs for administration because
19 the settlement itself exempts our appeal from any delay. And
20 so --

21 THE COURT: Well, you can certainly --

22 MR. SCOTT SMITH: I think it's -- I'm sorry, Your
23 Honor, if I stepped on your toes because of --

24 THE COURT: You didn't, but -- I stepped on yours.

25 MR. SCOTT SMITH: -- the delay on the computer.

1 THE COURT: I stepped on yours. Go ahead.

2 MR. SCOTT SMITH: No, I'm just going to say I think
3 it's 8c. It's on page 29 of the settlement agreement, Your
4 Honor.

5 THE COURT: So is there's two questions, then. One
6 is, can you be held jointly liable? And second is, should you
7 be held jointly and liable -- jointly and severally liable I
8 should say? So those are two questions. I don't mind you
9 addressing both, but I am going to ask you all to file briefs
10 within two weeks from today on -- and just to make you feel
11 better, Scott -- whether the Court can hold appellants jointly
12 and severally liable for appeal costs and, if so, which ones.
13 There may be a difference there. And second, just to make the
14 Objectors feel better, we'll address whether the Court should,
15 in fact, do that in its discretion if it has the authority.
16 But the first question is --

17 MR. SCOTT SMITH: Your Honor --

18 THE COURT: Go ahead.

19 MR. SCOTT SMITH: -- I don't have any problem with the
20 jurisdictional issue. I think you and I dealt with that with
21 Mr. Bottini years ago. I think the jurisdictional issues are
22 pretty well established.

23 THE COURT: Okay.

24 MR. SCOTT SMITH: That was --

25 THE COURT: And then I'll also allow -- look, on Zoom,

1 look, it's fine. Don't feel bad. You're getting -- you're
2 not getting realtime when I'm starting to talk, so I apologize
3 to you for that. But I would say this: I'll let you add a
4 third section on there of your briefing and that is anything
5 else you wish you'd gotten one more lick in on this that you
6 didn't get a chance to say if you wanted to; okay?

7 MR. SCOTT SMITH: Great.

8 THE COURT: So let's say two weeks from today I want
9 briefs on authority for the Court to hold appeal costs, that
10 the Objectors are jointly and severally liable, second,
11 whether the Court should, and third, anything else the parties
12 think the Court needs to consider before making a final ruling
13 on the appeal bond; okay? Does that work for everybody?

14 MR. CYRIL SMITH: Understood, Your Honor. Yes. Thank
15 you.

16 THE COURT: Scott Smith?

17 MR. SCOTT SMITH: Thank you, Your Honor.

18 THE COURT: All right. And our --

19 MR. LOWREY: Yes, Your Honor.

20 THE COURT: -- Home Depot?

21 MR. LOWREY: Thank you.

22 THE COURT: Yes. Thank you.

23 MR. CYRIL SMITH: Thanks, Your Honor.

24 THE COURT: All right. Are we concluded on this?
25 Nobody else has any input on this?

1 MS. DEMASI: Your Honor, may I make one point? Karen
2 DeMasi, on behalf of the Blues.

3 THE COURT: I've been waiting for you to.

4 MS. DEMASI: So the Blues don't take a position on the
5 motion for the appeal bond, but just in light of the argument,
6 I just -- I want to make two points.

7 THE COURT: Okay.

8 MS. DEMASI: The first point --

9 THE COURT: You're going to probably address
10 replenishment.

11 MS. DEMASI: I am going to -- that's point two. Point
12 one, Your Honor, is with respect to implementation.

13 THE COURT: Yes.

14 MS. DEMASI: I just want to make clear for the record
15 that the Blues are in compliance with their implementation
16 obligations, taking steps necessary as practicable. And as
17 Your Honor will recall, the Blues implemented the elimination
18 of the national best efforts rule in April of 2021 even --

19 THE COURT: Straightaway before there was even final
20 approval.

21 MS. DEMASI: Even ahead -- exactly. Thank you, Your
22 Honor.

23 With respect to point two, replenishment, I want to
24 make sure everyone has in mind exactly what the settlement
25 agreement says. That's in subparagraph ggg on page 13 of the

1 settlement agreement. There isn't actually a right to
2 replenishment. There is the ability of the Subscriber counsel
3 to petition for replenishment upon a showing of necessity.
4 That is the standard, and, of course, were that to come to
5 pass, the Blues would have a position on that.

6 THE COURT: Yeah, you'll stand up when you need to
7 stand up if there's anyone talking about spending more money;
8 right?

9 MS. DEMASI: Correct, Your Honor. Thank you.

10 THE COURT: Okay. And that's paragraph lggg you're
11 referring to; right?

12 MS. DEMASI: Yes, yes. Thank you.

13 THE COURT: And that provides that settlement class
14 counsel and self-funded class counsel may petition the Court
15 for replenishment of notice and administration fund upon a
16 showing of necessity for replenishment, and then we'd
17 obviously have to take that up if that occurred. But we're
18 still -- and I realize this may be a dated cost figure. Let
19 me just see -- we're still -- as of the last time I was
20 notified about this, I think the notice and administration
21 fund had been billed fees and expenses totaling
22 \$73,666,447.74. Is that still -- may be a little higher now,
23 but is that still the ballpark?

24 MS. DEMASI: I think that is the ballpark, Your Honor.
25 I do think it's a little bit higher now -- I'm looking at

1 Subscriber counsel, so there may well be -- updated, but
2 that's a ballpark figure.

3 THE COURT: We've still got another 25 million left in
4 that fund. And nobody thinks there is any threat that we're
5 going to need a replenishment anytime soon; fair?

6 MS. DEMASI: Absolutely fair from our perspective.

7 THE COURT: I know it would be fair from your -- let
8 me hear from Megan Jones.

9 MS. JONES: I think that -- if you're asking me, yes,
10 we're not --

11 THE COURT: You're not worried about -- you're not
12 thinking about a replenishment petition at this point?

13 MS. JONES: I am not, Your Honor.

14 MS. DEMASI: Thank you.

15 THE COURT: That is helpful. Thank you, Miss DeMasi.
16 All right. What else on this issue?

17 MR. CYRIL SMITH: Your Honor, I would just say on
18 this, we agree with the Blues that they're in compliance,
19 okay, and so effectively, contrary to the argument that the
20 Objectors make that --

21 THE COURT: Well, at least they have that to take away
22 from this hearing today.

23 MR. CYRIL SMITH: Exactly. But in other words,
24 there's not some right we have to accelerate the
25 implementation of the injunctive relief. That's just not a

1 thing under this agreement.

2 THE COURT: Right, right.

3 Okay. What else do we need to take up in the status
4 conference with everyone here on either track? Any other
5 reports? Beefs? Good and welfare?

6 All right. I guess the next thing that we're going to
7 do, then, is I would like to meet with counsel who are
8 involved in the opt-out cases. How many -- stand up if you
9 think you're attending that meeting today. Okay. That will
10 not be in chambers, based upon my count here. We will do that
11 in the judicial conference room next. And you all have a
12 seat. Let me have Mr. -- is it Mr. Ball and Mr. Pendley? Do
13 you all have cars and/or planes to catch? You-all want to get
14 on the road? I'd like to meet with you-all before we do the
15 opt-out scheduling conferences and I'd like to do that in my
16 office here in just a moment if we're ready to conclude this
17 portion of the status conference; okay?

18 All right. What else? Are we ready to proceed on,
19 then? At this point I'd like an affirmative motion to
20 adjourn.

21 MS. JONES: There's nothing left for the Plaintiffs,
22 Your Honor.

23 THE COURT: All right.

24 MS. DEMASI: And same for the Defendants, Your Honor.

25 THE COURT: All right.

1 MR. RAGSDALE: Motion to adjourn.

2 THE COURT: And nothing further. All right. Very
3 well. Hey, I said this to the two caucus sessions today.
4 Subscribers haven't heard this as I usually want you to hear
5 it. It's been a privilege and continues to be a privilege to
6 be your judge in this case. Great lawyering. The excitement
7 and fun of handling this far outweighs the headaches, not that
8 there aren't headaches. But I really do appreciate the
9 lawyering and appreciate each of you personally; all right?
10 And with that, we'll be adjourned.

11 (Adjourned accordingly at 11:10 p.m.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

Dated: February 16, 2023.

Pamela G. Weyant

Pamela G. Weyant, RDR, CRR, CCR
Official Court Reporter